Supreme Court, U.S.
FILED
APR 14 1999
CLERK

No. 98-1117

In the Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, ET AL., PETITIONERS

v.

IRIS I. VARNER, ET AL.

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21 pp

QUESTIONS PRESENTED

1. Whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. 206(d).

2. Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963 falls within Congress's power under Section 5 of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Aaron v. *Kansas*, 115 F.3d 813 (10th Cir. 1997)	4
Abril v. *Virginia*, 145 F.3d 182 (4th Cir. 1998)	4
Anderson v. *State Univ.*, No. 98-7025, 1999 WL 92319 (2d Cir. Feb. 24, 1999)	10
Bailey v. *United States*, 516 U.S. 137 (1995)	10
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	12, 13, 15, 16
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	16
City of Rome v. *United States*, 446 U.S. 156 (1980)	12, 16
Close v. *New York*, 125 F.3d 31 (2d Cir. 1997)	4
Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974)	11, 13
Dellmuth v. *Muth*, 491 U.S. 223 (1989)	6, 9
EEOC v. *Wyoming*, 460 U.S. 226 (1983)	15
Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982)	8
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	10, 15
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	13, 14, 16
Green v. *Mansour*, 474 U.S. 64 (1985)	4
Hale v. *Arizona*, 993 F.2d 1387 (9th Cir.), cert. denied, 510 U.S. 946 (1993)	4

Cases—Continued: Page

Howlett v. *Rose*, 496 U.S. 356 (1990) 7
Humenansky v. *Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998), petition for cert. on other grounds pending, No. 98-1235 4
Jefferson County Pharm. Ass'n v. *Abbott Labs.*, 460 U.S. 150 (1983) 14
Kahn v. *Shevin*, 416 U.S. 351 (1974) 13
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 15
Kimel v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 901 (1999) 11
Larry v. *Board of Trustees*, 975 F. Supp. 1447 (N.D. Ala. 1997), aff'd on reconsideration, 996 F. Supp. 1366 (1998), appeal pending, No. 98-6532 (11th Cir.) 10
Lopez v. *Monterey County*, 119 S. Ct. 693 (1999) 12, 15
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 16
Mills v. *Maine*, 118 F.3d 37 (1st Cir. 1997) 4
Mississippi Republican Executive Comm. v. *Brooks*, 469 U.S. 1002 (1984) 12
Mondou v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1 (1912) 7
National Mut. Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949) 16
North Haven Bd. of Educ. v. *Bell*, 456 U.S. 512 (1982) 14
O'Sullivan v. *Minnesota*, appeal pending, No. 98-2706 (8th Cir.) 10
Oregon v. *Mitchell*, 400 U.S. 112 (1970) 14
Pennoyer v. *Neff*, 95 U.S. 714 (1878), overruled on other grounds, 433 U.S. 186 (1977) 7
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989), overruled on other grounds, 517 U.S. 44 (1996) 6
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 2

Cases—Continued: Page

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 3, 4, 6, 9, 10
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 12
Strauder v. *West Virginia*, 100 U.S. 303 (1880) 16
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 12
Timmer v. *Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997) 4, 10
United States v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 902 (1999) 11
United States v. *Morton*, 467 U.S. 822 (1984) 7
United States v. *Virginia*, 518 U.S. 515 (1996) 13
Usery v. *Allegheny County Inst. Dist.*, 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977) 10
Usery v. *Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977) 10
Ussery v. *Louisiana*, 150 F.3d 431 (5th Cir. 1998) 4, 10
Virginia, Ex parte, 100 U.S. 339 (1880) 16
Washington v. *Davis*, 426 U.S. 229 (1976) 12
Wisconsin Dep't of Corrections v. *Schacht*, 118 S. Ct. 2047 (1998) 6, 7, 8

Constitution and statutes:

U.S. Const.:
Amend. XI ..... *passim*
Amend. XIV (Equal Protection Clause) 12, 14
§ 5 ..... *passim*
Age Discrimination in Employment Act of 1967, 29 U.S.C.621 *et seq.* 11
Americans with Disabilities Act of 1990, 42 U.S.C. 12202 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 14
Equal Pay Act of 1963, 29 U.S.C. 206(d) 2

Statutes—Continued: Page

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 4
29 U.S.C. 203(d) 4
29 U.S.C. 203(e)(2)(C) 5
29 U.S.C. 203(x) 5
29 U.S.C. 216(b) 5, 9
Federal Employers' Liability Act, ch. 149, 35 Stat. 65 7
Voting Rights Act of 1965, § 5, 42 U.S.C. 1973c 12
28 U.S.C. 1292 9
28 U.S.C. 1295 9
28 U.S.C. 1346(a)(2) 9
28 U.S.C. 1441(a) 6
28 U.S.C. 1442(a) 9
28 U.S.C. 1491(a) 9
28 U.S.C. 2403(a) 2

Miscellaneous:

H.R. Rep. No. 1714, 87th Cong., 2d Sess. (1962) 13
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1972) 14
S. Rep. No. 1576, 79th Cong., 2d Sess. (1946) 13
S. Rep. No. 2263, 81st Cong., 2d Sess. (1950) 13
S. Rep. No. 176, 88th Cong., 1st Sess. (1963) 13
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-26a) is reported at 150 F.3d 706. The opinions of the district court (Pet. App. 27a-38a, 47a-56a) are reported at 972 F. Supp. 458 and 986 F. Supp. 1107, respectively. The report and recommendation of the magistrate judge (Pet. App. 39a-46a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 21, 1998. A petition for rehearing was denied on October 13, 1998. Pet. App. 1a. The petition for a writ of

certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondents represent a class of female professors employed by petitioners Illinois State University and its Board of Regents. Pet. App. 48a. Respondents alleged, among other things, that petitioners paid them less than their male counterparts, in violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d). Pet. App. 48a.[1] Petitioners moved to dismiss the Equal Pay Act claim on the ground of Eleventh Amendment immunity. *Id.* at 29a-30a, 52a. The district court denied the motion, holding that the Equal Pay Act contained a clear abrogation of Eleventh Amendment immunity, and that the abrogation constituted a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. *Id.* at 53a-56a, 29a-32a.

2. Petitioners took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the Equal Pay Act. The court of appeals affirmed. Pet. App. 2a-26a.

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[1] Respondents also alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 48a- 49a. The district court denied petitioners' motion to dismiss the Title VII compensatory damages claims on Eleventh Amendment grounds. *Id.* at 32a-35a. The court of appeals affirmed. *Id.* at 23a-26a. Petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

Agreeing with every other court of appeals that has addressed the question, the court "ha[d] little difficulty holding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity" in the Equal Pay Act, in light of "the plain statutory language, which authorizes 'employees' to sue 'public agencies' in federal court for violations of the Equal Pay Act." Pet. App. 8a. The court also concluded that the Equal Pay Act was a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment. *Id.* at 10a-23a. The court found that Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." *Id.* at 21a. Furthermore, the court explained, the Equal Pay Act's burden-shifting scheme—in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then defendants must show that the differential is based on any factor other than sex—was "reasonably tailored to remedy intentional gender-based wage discrimination." *Id.* at 22a.

ARGUMENT

The court of appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals to address the question. Accordingly, further review is unwarranted.

1. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to

abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

Petitioners contend (Pet. 8-17) that the court of appeals erred in holding that the Equal Pay Act contains a clear expression of congressional intent to abrogate the States' Eleventh Amendment immunity. That claim does not merit this Court's review for two reasons.

First, the courts of appeals have unanimously rejected petitioners' argument. See *Mills* v. *Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Close* v. *New York*, 125 F.3d 31, 36 (2d Cir. 1997); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998), petition for cert. on other grounds pending, No. 98-1235; *Hale* v. *Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); *Aaron* v. *Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997). There is thus no conflict in the circuits.

Second, the decision of the court of appeals is correct and consistent with this Court's decisions. The Equal Pay Act was an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and relies on the FLSA's definitional and enforcement provisions. Petitioners concede (Pet. 11-12) that Congress clearly expressed its intent to include States as employers covered by the Equal Pay Act's substantive requirements: the Act defines the term "[e]mployer" to "include[] a public agency," 29 U.S.C. 203(d), and, in turn, defines "[p]ublic agency" as "the government of a State or political subdivision thereof" and any agency of

a State, 29 U.S.C. 203(x). Congress further underscored its intent by defining "employee[s]" covered by the Equal Pay Act to include, with certain exceptions, "any individual employed by a State." 29 U.S.C. 203(e)(2)(C).

Petitioners argue (Pet. 11-12), however, that Congress did not clearly and explicitly provide that the substantive Equal Pay Act right could be enforced against the States in federal court. That argument is mistaken. The Equal Pay Act (as part of the FLSA) provides that an "employee," which includes state employees (29 U.S.C. 203(e)(2)(C)), may bring an action "against any employer (*including a public agency*) in *any Federal* or State court of competent jurisdiction," 29 U.S.C. 216(b) (emphasis added). Contrary to petitioners' contention (Pet. 11), this provision plainly speaks not only to whether, but also to where, an Equal Pay Act suit may be brought against a State.[2]

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[2] Petitioners suggest (Pet. 11-12 n.4) that, because it is "well settled" that state employees must pursue their FLSA claims in state court, it must also be true that Equal Pay Act claims can only proceed in state court, since they both rely upon the same enforcement provision. Assuming without accepting petitioners' characterization about where FLSA claims "must" be brought, the difference in the fora available for the two claims has nothing to do with the clarity of Congress's expressed intent. Rather, it is attributable to court rulings regarding the scope of congressional power to abrogate under Section 5 of the Fourteenth Amendment. Congress clearly expressed its intent to subject States to suit in federal court in a single provision that governs both wage and hour claims under the FLSA and discrimination claims under the Equal Pay Act. While the courts of appeals have uniformly held that Congress had the power to abrogate Eleventh Amendment immunity in the Equal Pay Act because that statute is valid Section 5 legislation (see point 2, *infra*), the courts have also held that Congress had no such power with respect to the other provisions

Petitioners' attempts to escape this straightforward language are unavailing. Petitioners' complaint (Pet. 9) that the Equal Pay Act "does not even mention the Eleventh Amendment, sovereign immunity or abrogation" is beside the point. This Court has made clear that Congress need not employ specific terminology to manifest its intent to abrogate. See *Seminole Tribe*, 517 U.S. at 55-57; *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13-14 (1989) (plurality opinion), overruled on other grounds, 517 U.S. 44 (1996); 491 U.S. at 29-30 (Scalia, J., concurring in part and dissenting in part). Instead, Congress need only make clear that it intends to authorize private persons to sue States in federal courts. See *Seminole Tribe*, 517 U.S. at 57; *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (no "explicit reference to state sovereign immunity or the Eleventh Amendment" is necessary to abrogate).

Petitioners' contention (Pet. 9-11) that, in confining suits to courts of "competent jurisdiction," Congress intended to require suits against States to proceed in state court, is equally misplaced. This Court has repeatedly rejected such a reading of analogous references to courts' general subject matter jurisdiction. Indeed, just last Term, this Court unanimously held that the phrase "original jurisdiction" in the federal removal statute, 28 U.S.C. 1441(a), embraced any case that falls within the federal courts' general subject matter jurisdiction, without regard to Eleventh Amendment constraints. *Wisconsin Dep't of Corrections* v. *Schacht*, 118 S. Ct. 2047, 2052-2053 (1998). The Court explained that the Eleventh Amendment does not

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of the FLSA, because they do not constitute an exercise of authority under Section 5 of the Fourteenth Amendment. See Pet. App. 10a n.5 (citing cases).

operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Id. at 2052 (citations omitted); see also *id.* at 2055 (Kennedy, J., concurring); *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("The concept of a court of 'competent jurisdiction'" is "usually used to refer to subject-matter jurisdiction," and not to personal jurisdiction over particular defendants); *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878) ("a tribunal competent by its constitution" refers to a court that is authorized "by the law of its creation * * * to pass upon the subject-matter of the suit," without regard to whether a particular defendant can be brought before the court), overruled on other grounds, 433 U.S. 186 (1977).[3]

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[3] Cf. *Howlett* v. *Rose*, 496 U.S. 356, 381 (1990) (state sovereign immunity principles will not be interpreted to prevent "a court of otherwise competent jurisdiction" from entertaining federal-law claims); *id.* at 382 (same with respect to "a court otherwise competent"); *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 56-57 (1912) (interpreting similar language in the Federal Employers' Liability Act, ch. 149, 35 Stat. 65: when a court's "ordinary jurisdiction * * * is appropriate to the occasion," principles of state sovereign immunity cannot be interposed to prevent enforcement of a federal right). Indeed, if the phrase "competent jurisdiction" bears the meaning petitioners ascribe, then Congress's abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act of 1990, 42 U.S.C. 12202,

Similarly, federal district courts are courts of "competent jurisdiction" for Equal Pay Act claims because they have jurisdiction over the subject matter; the Eleventh Amendment does not "automatically destroy * * * jurisdiction." *Schacht*, 118 S. Ct. at 2052. In addition, when Eleventh Amendment immunity is raised by a particular defendant, it does not bar jurisdiction; a federal court has jurisdiction over the suit because it is competent to hear claims when Congress has abrogated immunity. Thus, the statutory reference to courts of "competent jurisdiction" does not constitute an oblique reference to the Eleventh Amendment, but rather it excludes specialized federal and state courts (such as the Court of International Trade or state courts that adjudicate only criminal or family law cases) from being obliged to hear Equal Pay Act claims.[4]

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would be self-contradictory, because there Congress stated that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State *court of competent jurisdiction*" (emphasis added). This Court, however, will not construe statutory language in a manner that renders provisions nugatory. *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 163 (1982).

[4] Petitioners discuss at great length (Pet. 6-7, 12-15) the "incongruous result[s]" that they perceive the court's decision entails: namely, that FLSA suits could be brought against the United States in state court. That argument is a red herring. First, it has nothing to do with whether the court of appeals' decision merits this Court's review despite the complete harmony in circuit court rulings and consistency with this Court's precedents. Second, the determination of where the United States can be sued under the FLSA has nothing to do with the Eleventh Amendment questions petitioners present for review. Rather, it would be an issue of statutory construction regarding whether Congress intended the phrase "competent jurisdiction" to be construed in conjunction with the subject-matter limitations of other federal laws that Congress has enacted to channel monetary claims against the United

In addition to misunderstanding the law, petitioners' reading of "competent jurisdiction" collapses the two prongs of the *Seminole Tribe* inquiry, and thus simply begs the question, discussed in Part 2, *infra*, of whether Congress had the authority to abrogate Eleventh Amendment immunity. If it did, as we contend, then federal courts are "competent" to hear Equal Pay Act claims under even petitioners' reading of the statute.

Finally, petitioners contend (Pet. 15-16) that the court of appeals inappropriately relied on legislative history in holding that Congress intended to abrogate the States' Eleventh Amendment immunity. But this case does not present for review any question regarding the role of legislative history in discerning congressional intent to abrogate immunity. As petitioners concede in a footnote (Pet. 16 n.8), the court of appeals expressly stated that the "[legislative] history in itself has no bearing upon our inquiry into whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. Rather, that intent must be made 'unmistakably clear in the language of the statute.'" Pet. App. 7a n.4 (quoting *Dellmuth*, 491 U.S. at 228). Furthermore, even had the court relied upon it, the court's recitation of the amendment history of Section 216(b)—as opposed to considering traditional legislative history documentation like House or Senate Reports and congressional debates—would not have been inconsistent with this Court's

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States into specified courts, see 28 U.S.C. 1346(a)(2), 1491(a), and to provide the United States Court of Appeals for the Federal Circuit exclusive jurisdiction to review such judgments, 28 U.S.C. 1292, 1295. No court has yet confronted that statutory construction question; nor is any court likely to, because the United States can simply remove any FLSA action filed in state court to the appropriate federal court. 28 U.S.C. 1442(a).

decisions. To the contrary, this Court has held that reviewing the purely textual evolution of a legislative provision is an appropriate means of determining legislative intent. See *Bailey* v. *United States*, 516 U.S. 137, 147 (1995) ("The amendment history of [a statutory provision] casts further light on Congress' intended meaning.").

2. Petitioners also contend (Pet. 17-29) that, even if congressional intent is clear, Congress lacked the legislative authority to effect the abrogation because the Equal Pay Act is not an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim likewise does not merit this Court's review.

First, every court of appeals to address the question has ruled that the extension of the Equal Pay Act to the States was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Anderson* v. *State Univ.*, No. 98-7025, 1999 WL 92319, at *3-*4 (2d Cir. Feb. 24, 1999) (per curiam); *Ussery*, 150 F.3d at 437; *Timmer*, 104 F.3d at 838-839; *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).[5]

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[5] We are aware of appeals involving the validity of the Equal Pay Act's abrogation pending in two other circuits. See *Larry* v. *Board of Trustees*, 975 F. Supp. 1447 (1997), aff'd on reconsideration, 996 F. Supp. 1366 (N.D. Ala. 1998), appeal pending, No. 98-6532 (11th Cir.) (argued Mar. 23, 1999); *O'Sullivan* v. *Minnesota*, No. 98-2706 (8th Cir.) (oral argument scheduled for May 13, 1999).

Petitioners point (Pet. 26-29) to "disarray" in the circuits regarding the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* This Court, however, has already granted certiorari to resolve that conflict in cases that (unlike petitioners') actually present that question. See *United States* v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel* v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). The utter lack of disarray or even substantive disagreement in the appellate decisions analyzing the Equal Pay Act thus stands in sharp contrast to the Section 5 issues presented by other legislation and counsels strongly against further review.

Second, contrary to petitioners' argument (Pet. 20-26), the court of appeals correctly concluded that the Equal Pay Act falls squarely within Congress's power under Section 5 of the Fourteenth Amendment. The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference is not based on sex. See *id.* at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

Petitioners argue (Pet. 21 n.10) that the Equal Pay Act falls beyond Congress's power under Section 5

because it permits the imposition of liability without the showing of intentional discrimination that the Equal Protection Clause requires, see, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229 (1976). In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), however, this Court reaffirmed that, when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518; see also *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) (same). Similarly, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *City of Rome* v. *United States*, 446 U.S. 156 (1980), this Court upheld the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown. *South Carolina* v. *Katzenbach*, 383 U.S. at 325-337; *City of Rome*, 446 U.S. at 177; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment). Indeed, in *Flores*, the Court expressly reaffirmed that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 529 (citing *City of Rome*, *supra*, and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980)

(plurality opinion)). Congress's authority to prevent sex discrimination is equally broad.

Moreover, unlike the statute at issue in *Flores*, which comprehensively imposed a strict scrutiny standard on all state action even though there was little evidence of widespread constitutional violations, 521 U.S. at 530-533, the Equal Pay Act addresses the discrete problem of gender discrimination in salaries by establishing a remedial scheme that is carefully tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. Also unlike *Flores*, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, *id.* at 530, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[6]

Petitioners contend (Pet. 22-23) that there was no evidence that States in general (and Illinois in particular) engaged in intentional gender discrimination. But like their private counterparts, States had engaged in a long history of discrimination on the basis of sex. See *United States* v. *Virginia*, 518 U.S. 515, 531-534 (1996). Indeed, in extending Title VII to the States just two years before it extended the Equal Pay Act, Congress found evidence of sex discrimination by public em-

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[6] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); *Corning Glass Works*, 417 U.S. at 195; see also *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

ployers.[7] This "information and expertise that Congress acquires in the consideration and enactment of earlier legislation," *Fullilove*, 448 U.S. at 503 (opinion of Powell, J.), provides ample support for the tailored remedial scheme that Congress imposed. Nor is evidence of discrimination in the private sector "irrelevant" to the Fourteenth Amendment inquiry, as petitioners contend (Pet. 22). Congress was entitled to infer that discriminatory practices that pervade the private sector also occur in the public sector.[8] Furthermore, contrary to petitioners' suggestion (Pet. 23), this Court has long recognized that Congress need not find that individual States have engaged in discrimination before it may properly subject them to Section 5 legislation. See *Oregon* v. *Mitchell*, 400 U.S. 112, 133-134 (1970) (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.), 216-217 (opinion of Harlan, J.), 233-236 (opinion of Brennan, White & Marshall, JJ.), 283-284 (opinion of Stewart, J., joined by Blackmun, J., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); cf.

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[7] See S. Rep. No. 415, 92d Cong., 1st Sess. 7-8, 12 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, 20 (1972); see also *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 523 n.13 (1982) (noting that "[m]uch of the testimony" at the hearings for Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational programs receiving federal funds, "focused on discrimination against women in employment").

[8] Cf. *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

Lopez, 119 S. Ct. at 703-704 (state voting law subject to federal preclearance even though State as a whole is not a covered jurisdiction subject to preclearance under the Voting Rights Act, where the law will effect a voting change in and will be implemented in a covered county).

Lastly, petitioners contend (Pet. 23-26) that, in addition to determining that the substantive requirements of the statute can be upheld as valid Section 5 legislation, a court must make an additional judgment that abrogation of Eleventh Amendment immunity is "necessary" (Pet. 24) to enforce the substantive prohibition, which apparently would require some showing that "state courts are not a suitable forum" (Pet. 25). But in upholding the abrogation of Eleventh Amendment immunity for Title VII claims in *Fitzpatrick*, this Court did not undertake such an analysis. Instead, assuming that the substantive provisions were valid Section 5 legislation, 427 U.S. at 456 n.11, the Court simply held that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456. The microscopic review of Section 5 legislation that petitioners envision stands in sharp contrast to this Court's repeated statements that Section 5 authorizes "*Congress* in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" and that Congress's "conclusions are entitled to much deference." *Flores*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)); see also *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (legislation enacted pursuant to Congress's Section 5 authority is

valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power"); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).[9] In short, given Congress's superior fact-finding ability and the attendant "wide latitude" (*Flores*, 521 U.S. at 520) to which Congress is entitled in exercising its "comprehensive remedial power" under Section 5 of the Fourteenth Amendment,[10] the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys

APRIL 1999

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[9] See also *City of Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[10] *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 483).